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ABSTRACT

Legal issues concerning sexual harassment are examined, and advice regarding policies and procedures are offered as an update to a publication released by the College and University Personnel Association (CUPA) in 1981. Training methods and programs and special policy considerations for higher education are also covered. Of major concern is sexual harassment by supervisors and by coworkers in the workplace or by faculty members of students and by students of other students on campus. The institution remains responsible for establishing an harassment-free environment. In developing a policy to prevent sexual harassment, important issues are the degree of specificity of definitions and situations and the question of consenting sexual relationships between student and faculty and/or employee and supervisor. Appendices include: Equal Employment Opportunity Commission Guidelines on Discrimination Because of Sex; a list of sexual harassment court cases; sample policies on sexual harassment from higher education, business, industry, and the federal government; a complaint or grievance form; a sexual harassment investigation checklist for managers; a model questionnaire on sexual harassment; actions recommended for alleged victims of sexual harassment; descriptive information on 15 films; and an updated 5-page bibliography of resources and articles on sexual harassment.

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Sexual Harassment
Issues and Answers

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Sexual Harassment
Issues and Answers

A Guide for: Education
Business
Industry

College and University Personnel Association

The College and University Personnel Association is an international network of some 4,000 personnel administrators representing more than 1,300 colleges and universities. Through regular and special publications and studies, CUPA disseminates information to its members on the latest legal, legislative, and regulatory developments affecting personnel administration, as well as on trends and innovative policies and practices in the field. Other services include an annual conference, regional meetings, and seminars on timely topics of special interest to the personnel profession.

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Preface

This text is a sequel to CUPA's 1981 publication, *Sexual Harassment: An Employment Issue,* which presented an historical/sociological review of sexual harassment, the legal implications of 17 court cases, a thorough discussion of the EEOC guidelines, and practical approaches for prevention that included definitions, policy statements, grievance procedures, sanctions, and record keeping. The first book briefly discussed student issues as well, with a sample student grievance procedure included in an appendix.

The recent U.S. Supreme Court decision, *Meritor Savings Bank, FSB v. Vinson,* pointed up the need for a legal update and for more practical advice regarding policies and procedures. Hence this book, *Sexual Harassment Issues and Answers: A Guide for Education, Business, and Industry,* was prepared for publication by CUPA. Training methods and programs are given a separate chapter in the present volume and the bibliography of resources and articles on sexual harassment has been updated, with more materials included on training, in particular. When appropriate in the text, business firms, private industry or companies, and institutions of higher education all are referred to as "organizations."

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July, 1986

One

The Current Scene: A Review

After five years of experience in attempting to meet the 1980 EEOC "Guidelines on Sexual Harassment" under Title VII, the employers of business, industry, and higher education are reassessing their policies, procedures, and practices concerning this most difficult of all human-behavior issues in the workplace and on the campus. Rarely is there an article in the national weekly newsmagazines anymore; even those publications that specifically address working women are now emphasizing economics, perseverance in a career, and management styles rather than harassment issues.

Sexual harassment was not an important national news item in 1984–85; yet, even with the 1986 U.S. Supreme Court decision on *Meritor Savings Bank, FSB v. Vinson*, the issue remains a perplexing and persistent problem that must be reviewed and addressed if employers are to maintain environments in which good human resource practices can flourish. For business and industry, increased productivity, reduced absenteeism, lack of litigation, and cost-effective operations are paramount in judging the success of efforts to prevent sexual harassment in the workplace. For colleges and universities, the additional moral obligation to serve the community as a model employer as well as an educator of young adults, while protecting an individual's rights, makes it imperative that institutions re-evaluate their positions on this sensitive issue.

When the report, *The Lecherous Professor. . .*, by Billie Wright Dziech and Linda Weiner hit the country's campuses in 1985, it became apparent that the problem of faculty members sexually harassing students was still a hidden, almost silent issue, despite all the efforts of campus administrators to establish grievance procedures, referral services, dormitory counseling, and other measures to aid students. Indeed, student-to-student sexual harassment in the form of "acquaintance rape" became an issue of increasing importance for most deans of students in higher education.

The U.S. Supreme Court's 1984 ruling in the *Grove City College v. Bell* case seemed to undermine campus attempts to use Title IX for bolstering aggressive efforts to prevent sexual harassment of students by faculty and/or staff members. Even though brochures, training programs, films, and rap and orientation sessions all have been developed for both students and employees, the higher education community, for the most part, took a "wait-and-see" attitude while Congress wrestled with the Civil Rights Restoration Act, now languishing in committee.

Early Efforts Against Sexual Harassment

During the early 1980s, state human rights or civil rights commissions, partly funded by the EEOC, wrote into state regulations their versions of the Title VII guidelines. State women's commissions addressed the issue of sexual harassment in hearings and reports while backing new state regulations and offering seminars to train managers of business and industry. Companies established policies and employee awareness programs. More complaints were lodged, disciplinary actions taken, lawsuits filed, and decisions rendered. Business and industry saw the effects of litigation, with costs amounting to $70,000 or more and judgments of $50,000 or more not unusual. Colleges and universities saw some litigation, too, but elaborate grievance procedures with hearing boards and peer review usually settled disputes before they reached the courts. Informal (or even formal) mediation processes were established, and more women took "assertiveness" training courses than ever before.

Several companies wrote policy statements that were tough and explicit in defining what actions constituted sexual harassment:

> Specifically, no supervisor shall threaten or insinuate, either explicitly or implicitly, that an employee's refusal to submit to sexual advances will adversely affect the employee's employment, eval-

uation, wages, advancement, assigned duties, shifts, or any other condition of employment or career development. Other sexually harassing conduct in the workplace, whether committed by supervisors or nonsupervisory personnel, is also prohibited. This includes: offensive sexual flirtations, advances, or propositions; verbal abuse of a sexual nature; graphic verbal commentaries about an individual's body; sexually degrading words used to describe an individual; and the display in the workplace of sexually suggestive objects or pictures.

Other companies chose to start their policies with reference to the EEOC guidelines and then to cite problems caused by sexual harassment:

> . . .The company is in full agreement with the intent of these sex discrimination guidelines because effective working relationships between employees must be based on mutual respect. Therefore, actions which are counter to these guidelines are also counter to the company's position as an organization.
>
> Until recently, most people were unaware of the existence of sexual harassment in the workplace, or viewed it as something that wasn't so bad—something that society accepted, condoned, and put up with as "just part of the job." But recent studies have defined it and have shown that the effects of sexual harassment on its victims can be devastating: alcoholism, excessive drug use, family disruptions, psychosomatic illness, mental illness, work absenteeism, negative work attitudes, depression, poor motivation, nervousness, hostility, chronic fatigue, loss of strength, sleeplessness, and lowered self-confidence and self-esteem. . .

Institutions of higher education developed policies that, for the most part, encompassed both employees and students. Chapter Three of this book presents examples and special considerations of such policies, while Appendix C provides more examples.

Relationships Between Students and Faculty

In his now famous letter to the faculty dated April 1983, Dean Henry Rosovsky, Harvard University, made it abundantly clear that there are appropriate and inappropriate relationships between students and faculty members:

> Amorous relationships that might be appropriate in other circumstances are always wrong when they occur between a teacher or officer of the University and any student for whom he or she has a professional responsibility. Further, such relationships may have the effect of undermining the atmosphere of trust on which the educational process depends. Implicit in the idea of professionalism is the recognition by those in positions of authority that in their relationships with students there is always an element of power. It is incumbent upon those with authority not to abuse, nor to seem to abuse, the power with which they are entrusted.

He goes on to emphasize the definition of sexual harassment accepted by the Faculty Council:

> In the academic context, the term "sexual harassment" may be used to describe a wide range of behavior. The fundamental element is the inappropriate personal attention by an instructor or other officer who is in a position to determine a student's grade or otherwise affect the student's academic performance or professional future. Such behavior is unacceptable in a university because it is a form of unprofessional behavior which seriously undermines the atmosphere of trust essential to the academic enterprise.

He closed with a section on procedures and disciplinary actions.

Dean Rosovsky's letter, subsequently published by the Association of American Colleges, led many other institutions to write into their policies a section on faculty-student relationships:

> Consenting romantic and sexual relationships between faculty and student, or between supervisor and employee, while not expressly forbidden, are generally deemed very unwise. Codes of ethics for most professional associations forbid professional-client sexual relationships. In the view of the Senate, the professor-student relationship is one of professional and client. . . .
>
> (University of Minnesota)

Other institutions included sexual harassment issues in policies on unprofessional conduct, while maintaining a statement on academic freedom by indicating that sexual harassment and intimidation are inconsistent and inimical to the exercise of that academic freedom.

Sexual Harassment in Collective Bargaining

Finally, collective bargaining agreements generally have included sexual harassment issues in their articles on "Nondiscrimination in Employment" or on "Fair Practices." Most contracts allow employees to substitute a separate campus or company resolution procedure in lieu of the standard grievance process established for other types of disputes. For example, the American Federation of State, County, and Municipal Employees (AFSCME) produced its own booklet on sexual harassment in 1980, and included in it the advice to unions that

they "...explore the possibility of having a management person within the organization to whom problems of sexual harassment could be brought in strict confidentiality. This person would have authority to investigate the complaint and try to resolve it informally before a formal complaint or grievance is filed...."[1] Collective bargaining agents are becoming even more aware of the growing numbers of women in the workforce and frequently use a strong stand against sexual harassment as a tool to increase their membership.

Summary

Both institutions of higher education and business and industry have had several years of dealing with sexual harassment. The problem is still a "men and women at work" or a faculty-student issue, still a power issue, still a communications and behavior issue, whether on the campus or in the office or in the factory. Sexual harassment by supervisors and by coworkers in the workplace or by faculty members of students and by students of other students on campus still raises serious questions about the reasons for such behavior and about the liability of organizations covered by Titles VII and IX. With policies, grievance procedures, training programs, and support services in place, business and industry as well as colleges and universities have a better chance of resolving problems and preventing sexual harassment than those organizations that still act as if "it can't happen here."

Any program that is at least five years old needs reassessment in light of the organization's own experience as well as of new information shared by others. The recent Supreme Court decision makes it clear that policies on sexual harassment and internal grievance procedures to deal with this issue are of paramount importance. Legal updates, special considerations, practical procedures, and training techniques can help insure a workplace and/or an academic environment that is free from unlawful, discriminatory practices; a place in which "...useful, logical, mutually satisfying, gender-related social and work behaviors are the norm rather than the exception."[2]

REFERENCES

[1]Wurf, Jerry. *On the Job Sexual Harassment: What the Union Can Do.* Washington DC: AFSCME, 1980, pp. 11–12.

[2]Fuller, Mary. *Sexual Harassment: How to recognize and deal with it.* Maryland: What Would Happen If... Inc., 1979, p. 40.

Two

A Legal Update

The first sexual harassment case to reach the Supreme Court, *Meritor Savings Bank, FSB v. Vinson*,[1] was decided on June 19, 1986. While the Court's decision clarified several important issues involved in sexual harassment litigation, the Court stopped short of issuing a definitive statement on perhaps the most controversial question in this area of the law—whether an employer may be held liable for sexual harassment on the part of a supervisor even though the employer had neither knowledge nor notice of the unlawful conduct. In order to recognize and apply the guidelines that the Court has set out, as well as the unsettled areas that the Court undoubtedly will be called on again to address, it is essential to be familiar with the legal concepts and controversies involved in current sexual harassment litigation.

Defining Prohibited Conduct

Sexual harassment has been defined as "'the unwanted imposition of sexual requirements in the context of a relationship of unequal power,' such as employer and employee or professor and student."[2]

The legal definition, which has been analyzed extensively by the courts, is set out in guidelines adopted in 1980 by the Equal Employment Opportunity Commission (EEOC).[3] The EEOC guidelines define sexual harassment broadly to include any unwelcome sexual conduct that is either (1) "made. . .a term or condition of an individual's employment" or (2) "has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[4]

The courts have interpreted the principles reflected in the EEOC guidelines as describing two principal types of sexual harassment: (1) harassment as a term or condition of employment (quid pro quo cases) and (2) harassment that creates a "poisoned" or "hostile" work environment ("working conditions" cases). Quid pro quo harassment occurs when specific academic or employment benefits are withheld as a means of coercing sexual favors. Therein lies the quid pro quo. The party in the superior position of power uses his or her actual or apparent authority to hire, fire, discipline, or promote.[5]

In the typical "working conditions" case, a superior either creates or condones a work environment in which sexual harassment exists.[6] The victim is not required to demonstrate the loss of any tangible job benefits as a result of the prohibited conduct.[7] Although the EEOC Guidelines explicitly include the "working conditions" sexual harassment theory, some preguidelines decisions held that sexual harassment claims under Title VII were not actionable unless acquiescence had been a condition of continued employment.[8] However, since the decision by the Court of Appeals for the District of Columbia in *Bundy v. Jackson*, most courts have held that allegations of an intolerable, sexually demeaning work environment successfully state a claim under Title VII of the Civil Rights Act of 1964.[9] In addition, sexist-type remarks or jokes can be actionable under the working conditions theory.

Proving Quid Pro Quo and "Working Conditions" Sexual Harassment

In *McDonnell Douglas Corp. vs. Green*,[10] the Supreme Court established the basic order and allocation of proof in disparate treatment claims brought under Title VII of the Civil Rights Act of 1964. For quid pro quo claims of sexual harassment, the courts have adopted the *McDonnell Douglas* criteria and require the plaintiff to allege and prove:

1. The employee belongs to a protected group.
2. The employee was subjected to unwelcome sexual harassment.
3. The harassment complained of was based on sex.

4. The harassment complained of affected a term, condition, or privilege of employment.

5. *Respondeat superior* (under this doctrine, an employer is legally responsible for actions by employees that occur during the course of their employment).[11]

The employee has established a *prima facie* case, that is, has stated a valid claim of sexual harassment under Title VII, once these elements have been proven by "the preponderance of the evidence," which means that the evidence advanced by the plaintiff demonstrates that the fact sought to be proven is more probable than not. The focus of the litigation then shifts to the employer, who must rebut the plaintiff's *prima facie* case by articulating "clear and convincing evidence" of legitimate, nondiscriminatory business reasons for its action. The "clear and convincing" standard is an intermediate level of proof that is greater than a mere preponderance of evidence but less than the degree of certainty described as "beyond a reasonable doubt," as is required in criminal cases.[12] If the employer is able to meet this standard, the claimant still has the opportunity to prove, again by the "preponderance" level of proof, that the employer's purported reasons are pretextual.[13]

As for "working conditions" sexual harassment, at least one commentator has observed that the *McDonnell Douglas* approach is inappropriate because it concentrates on determining whether the employer had an acceptable motive for the offending behavior.[14] Since, by definition, sexual harassment occurs because of the harassed employee's sex, "[t]here is no point in litigating the motive for sexual harassment."[15] Courts that have recognized this difficulty have held that a plaintiff establishes a *prima facie* case of "working conditions" sexual harassment "upon demonstrating that unwelcome verbal and/or physical advances of a sexual nature were directed at him/her in the workplace, resulting in a hostile or abusive working environment."[16] After the plaintiff has met his or her burden, "the employer may rebut the showing either directly, by proving that the events did not take place, or indirectly by showing that they were isolated or genuinely trivial."[17]

In both quid pro quo and "working conditions" cases of sexual harassment, the employer's liability may be determined by the status, relative to the victim, of the offending employee.

Employer Liability for Sexual Harassment By Supervising Employees

Section 703(a)(1) of Title VII provides that it is an unlawful practice for an "employer" to discriminate against applicants or employees on the basis of sex.[18] An employer is defined as a person engaged in an industry affecting commerce and "...any agent of such a person...."[19] An initial problem in Title VII sexual harassment cases was how to determine the circumstances under which an employer could be held liable for the conduct of its supervisory personnel.[20] When loss of tangible benefits are proven (quid pro quo cases), it appears to be settled law that an employer may be held strictly liable for a supervisor's sexual harassment of a subordinate employee.[21]

The EEOC guidelines also establish "strict liability" for employers when the harassment is committed by a supervisory employee, "regardless of whether the specific acts complained of were authorized or even forbidden by the employer, and regardless of whether the employer knew or should have known of their occurrence."[22] Thus, the majority of courts have held that a plaintiff need not prove that an employer had knowledge of the supervisor's alleged sexual harassment when a tangible loss in job benefits was threatened.

For "working conditions" claims, the Supreme Court has not yet ruled on whether an employer is also "strictly liable" when the victim's immediate supervisor created the hostile environment and was the only management personnel with knowledge or notice of the discrimination. However, the Court was presented with both sides of this issue on March 25, 1986, when it heard oral arguments on the first case to come before it involving a claim of sexual harassment, *Meritor Savings Bank, FSB v. Vinson*.[23]

Meritor Savings Bank, FSB v. Vinson

Meritor Savings Bank involved a charge of sexual discrimination brought under Title VII by Mechelle Vinson, a former employee of what is now Meritor Savings Bank ("the bank"). Vinson alleged that over the four-year course of her employment with the bank, from 1974 until her resignation in 1978, she had been subjected to constant sexual harassment by her supervisor, Sidney Taylor. She testified at trial that she ultimately relented to her supervisor's sexual advances out of fear that her continued refusal would jeopardize her employment. Included in her allegations were charges that her supervisor often followed her into the ladies' room, exposed

himself to her at times, and required her to submit to his sexual advances both during and after business hours. She estimated that during this period, she had intercourse with her supervisor some 40 to 50 times.

Taylor testified that Vinson frequently had worn provocative clothing to work and openly volunteered intimate details of her "bizarre sexual fantasies" to other employees at the bank. He also denied Vinson's allegations, contending that her charges had been brought in retaliation for a business-related dispute. The bank contended that it should not be held liable because the alleged sexual harassment by its supervisor had not been brought to its attention and had been engaged in without its consent or approval.[24]

The trial court denied relief, but failed to resolve the conflicting testimony regarding the existence of a sexual relationship between Vinson and her supervisor. Instead, it found that Vinson "was not the victim of sexual harassment and was not a victim of sexual discrimination" while employed at the bank because the "relationship was a voluntary one having nothing to do with her continued employment at [the bank] or her advancement or promotion at that institution."[25] As to the question of whether the bank could have been held liable had Vinson proved a violation of Title VII, the trial court concluded that the bank could not be held accountable because it was without notice of Taylor's alleged activities.[26]

A three-judge panel of the U.S. Court of Appeals for the District of Columbia, after reviewing prior precedent as well as the EEOC guidelines, rejected the lower court's finding that the plaintiff had failed to state a claim under Title VII and that the supervisor's discriminatory activity could not be attributable to the bank.[27] The court held that a violation of Title VII may be predicated on either quid pro quo or hostile environment sexual harassment and that Vinson's grievance was clearly of the latter type.[28] In addition, the panel ruled that the bank could not introduce evidence regarding the plaintiff's clothing or suggestive conduct to support its argument that, rather than being a victim of harassment, the plaintiff was a willing participant in the sexual relationship.

The court concluded that if the evidence demonstrated that "Taylor made Vinson's toleration of sexual harassment a condition of her employment," her *voluntariness* was not relevant to the issue of whether she was a victim of sexual harassment.[29]

The majority panel reasoned that a victim's capitulation to on-the-job sexual advances should not work as a forfeiture for the claimant's opportunity to redress. The panel warned that the victim faced a "hideous quadrilemma" and argued that "[i]f capitulation were dispositive,. . .a victim must choose among (1) acquiescence in the harassment, (2) opposition to it, (3). . .resignation from her job, or (4) to yield and thereby lose all hope of legal redress for being put in this intolerable position in the first place."[30]

Addressing the question of the bank's liability, the court held that an employer could be held absolutely liable for sexual harassment practiced by a supervising employee, regardless of whether the misconduct was brought to its attention, because a supervisor is an agent of an employer and, thus, may be deemed to be the employer.[31]

On motion by the bank to rehear the panel's decision, the full bench for the District of Columbia Circuit refused to reconsider the ruling by a seven-to-three vote. The dissenting judges, in arguing that the panel's decision would impose liability on an employer in situations where the charging person's conduct was in fact a solicitation of sexual advances, warned that "[t]hese rulings seem plainly wrong. By depriving the charged person of any defenses, they mean that sexual dalliance, however voluntarily engaged in, becomes harassment whenever an employee sees fit, after the fact, so to characterize it."[32]

On review, the Supreme Court analyzed four major areas of concern. First, the Court affirmed the Court of Appeals' ruling that a claim of sexual harassment can be brought under Title VII even though the victim did not suffer the loss of a specific job benefit as the result of the alleged harassment. Second, the Court rejected the trial court's holding that a plaintiff's "voluntariness" in sex-related conduct is a defense in a sexual harassment case and directed the trial court to determine, instead, whether the advances were "unwelcome."

Third, the Court rejected the court of appeals' holding that evidence of a plaintiff's sexually provocative dress and speech may not be admitted in the defense of a sexual harassment case. Fourth, the Court rejected the Court of Appeals' holding that would have imposed absolute liability on employers for acts of sexual harassment by supervisors, regardless of both the circumstances and the employer's knowledge of the sexual harassment, but declined to issue a definitive rule since the underlying liability of the bank's supervisor, if any, had not yet been established.

In ruling that a plaintiff may bring a sexual discrimination suit under Title VII, based on acts of

sexual harassment that did not affect a specific condition of employment, the Court resolved a conflicting area of the law. The Court determined that, in accordance with the legislative history of Title VII and the EEOC Guidelines on Sexual Harassment, Title VII is not limited to situations in which the victim is confronted with the threatened or actual loss of "economic" or "tangible" job benefits, that is, quid pro quo sexual harassment, but applies to hostile environment harassment as well.

In addition, the Court upheld the appellate court's finding that the trial court improperly considered whether Vinson's sexual relationships with her supervisor were "voluntary." The Court ruled that "voluntariness" is not a defense in sexual harassment suits under Title VII. Instead, the Supreme Court held that the trial court should have focused on whether the alleged sexual activity was "unwelcome."

With respect to whether a defendant to a Title VII suit can introduce evidence of the plaintiff's sexually provocative dress or speech, the Court concluded that there should be no per se rule against the admissibility of such evidence. The Court reasoned that evidence of this nature may be relevant to the determination of whether the alleged conduct was "unwelcome." Thus, the trial court could properly consider evidence introduced for this purpose.

Addressing the issue of the employer's liability, the Court, although declining to issue a definite rule, did acknowledge that it agreed generally with the EEOC that Congress, in passing Title VII, intended for courts to look to general agency principles in deciding employer liability. Advancing this as the reason for rejecting a rule of strict liability, the Court stated, "We hold that the Court of Appeals erred in concluding that employers are always automatically liable for the sexual harassment of their supervisors."

On the other hand, the Court specifically rejected the employer's argument, which was adopted by the trial court, that the existence of a grievance procedure and a policy against discrimination, coupled with the complainant's failure to invoke that procedure, insulated an employer from liability. The Court noted that the bank's general nondiscrimination policy did not specifically address sexual harassment, as is suggested for such policies by the EEOC's regulations. Moreover, the Court observed that, under the bank's grievance procedure, Vinson would have been required to complain to her supervisor, the alleged perpetrator of the sexual harassment. Thus, as the Court pointed out, in these circumstances "it is not altogether surprising that Ms. Vinson failed to invoke the grievance procedure." The Court concluded that the bank's argument that failure to invoke the procedure should insulate it from liability would be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward.

The Supreme Court remanded the case to the trial court to determine whether Vinson was the victim of "hostile environment" sexual harassment on the part of her supervisor, Sidney Taylor. In making this determination, the Court has further instructed the trial court to resolve whether her supervisor's advances were *unwelcome*, rather than if the alleged sexual relationship was *voluntary*. If, after reviewing the evidence, the trial court finds that Taylor unlawfully discriminated against Vinson, it may examine the specific circumstances in which the violation may have occurred, in order to decide whether Vinson's employer may be held liable for her supervisor's behavior.

As a result of this Supreme Court decision, employees may file sexual harassment claims under Title VII on the "hostile environment" theory alone and need not prove the loss of a job benefit, as in quid pro quo harassment claims. All that must be shown is that the sexual harassment was pervasive to the extent that it became a condition of employment. In defending against sexual harassment suits, defendants may submit evidence of the plaintiff's sexually provocative attire or speech but may not raise a defense based on the theory that the victim "voluntarily" participated in the sex-related conduct. Rather, the critical legal question is whether the sexual advances were "unwelcome."

An open question remains as to whether an employer can be held liable in "hostile environment" cases where the employer has no knowledge of the alleged sexual harassment. The Supreme Court's guidelines in this regard strongly suggest that an employer's policies should specifically state that sexual harassment is prohibited and also provide for a mechanism that "encourages" employees to air their problems with their employer before resigning.

Employer Liability For Sexual Harassment By Coworkers

Sexual harassment by fellow employees, those equal to or even inferior to the harassed victim in job rank or status, is almost as pervasive as harassment by supervisory personnel. A 1981 survey of employers who had experienced harassment com-

plaints found that 46 percent of the companies believed immediate supervisors were the principal offenders, while 33 percent ranked coworkers and peers as the primary abusers.[33]

Under the EEOC guidelines, an employer is liable for coworker harassment when a claimant can demonstrate actual or constructive knowledge on the part of the employer.[34] Once a *prima facie* case has been established, an employer may rebut by showing that it "took immediate and appropriate corrective action."[35] This showing also must be made when the employer learns of harassment by nonemployees.[36] The EEOC has ruled that employer responses that constitute "immediate and corrective action" must be determined on a case-by-case basis.[37] The following two cases illustrate the concepts espoused in the EEOC Guidelines.

Continental Can Co. v. State

In *Continental Can Co. v. State*,[38] the Minnesota Supreme Court applied Title VII principles to a state statute. A female employee had informed her supervisor that certain, then unnamed, coworkers had subjected her to sexually derogatory remarks and verbal sexual advances.[39] She was told "there was nothing [that could be done] and that she had to expect [such] behavior when working with men."[40] As a result of a subsequent incident in which the victim was grabbed between the legs by one of her harassers, the employer, after taking no action for almost a month, finally suspended the offending employee and disseminated an antiharassment policy. The court, adopting a standard of liability similar to that contained in the EEOC guidelines, held that the employer's failure to respond promptly to known incidences of sexual harassment was a separate act of discrimination.[41]

Katz v. Dole

For an employer's response to incidents of sexual harassment to constitute "appropriate corrective action," it must be "reasonably calculated to end the harassment."[42] Employer action that was not so calculated was found to have occurred in *Katz v. Dole*.[43] In *Katz*, a female air traffic controller found herself the object of verbal sexual harassment by her fellow controllers.[44] When she informed one of FAA's supervisory personnel of the problem, he not only did nothing effectual to stop it, he took part in the harassment by suggesting, among other things, that her complaint might be solved if she submitted to him.[45]

The court noted that although the agency had articulated a policy against sexual harassment under a program involving seminars on the issue for its supervisors, supervisory personnel were aware that the policy had not been effective. Thus, the court upheld the plaintiff's claim, holding that "[n]o significant effort was made to end the harassment."[46]

Sexual Harassment on Campus

While sexual harassment claims may be brought against educational institutions under Title VII,[47] victims also may seek relief under Title IX of the Educational Amendments of 1972.[48] Title IX applies to any educational program or activity that receives federal funds and protects both employees and students.[49] The Office of Civil Rights (OCR) in the U.S. Department of Education administers Title IX and has adopted the following working definition of sexual harassment:

> Sexual harassment consists of verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of a recipient that denies, limits, provides different, or conditions the provision of and benefits, services, or treatment protected under Title IX.[50]

Three primary avenues are available to employee and student victims of sexual harassment by educational programs receiving federal support: (1) file a grievance with the institution, (2) appeal for federal enforcement by filing an OCR complaint, and (3) bring a private action under Title IX.[51]

OCR regulations require recipient institutions to maintain grievance procedures that provide "prompt and equitable" resolution of complaints alleging sexual discrimination or harassment.[52] In addition, a recipient institution must provide notice to employees and students of its grievance policy and procedures.[53]

Sexual harassment victims who are not satisfied with the result arrived at under an institution's grievance procedures generally have 180 days from the last date of the alleged discrimination to file a complaint with an OCR regional office. The regional office then investigates the charge and makes an initial determination of compliance. At risk to the institution, if a compliance problem is found and not resolved, is the federal financial assistance which it receives.[54]

Alternatively or in conjunction with pursuing institutional grievance procedures and an OCR complaint, sexual harassment victims may bring private actions under Title IX.[55] The courts have recognized that in Title IX actions, "it is perfectly reasonable to maintain that academic advancement conditioned upon submission to sexual demands

constitutes sex discrimination in education, just as questions of job retention or promotion tied to sexual demands from supervisors have become increasingly recognized as potential violations of Title VII's ban against sex discrimination in employment."[56]

Furthermore, although the preponderance of sexual harassment case law generally has developed in the context of Title VII, the EEOC Guidelines are equally applicable to Title IX.[57] Although no plaintiff has yet to prevail in a Title IX sexual harassment suit, very probably because only a handful of such cases has been brought to date, courts are likely to authorize, as in Title VII claims, only equitable remedies.[58] Such remedies generally include injunctions forbidding harassing practices or mandating the establishment of grievance procedures, reinstatement, back pay awards, attorneys' fees, and court costs.

Summary

The Supreme Court ruled on its first sexual harassment case in 1986. Although the decision left no doubt that sexually offensive or hostile working environments are subject to the prohibition against sexual discrimination contained in Title VII, it did not specifically rule on the extent of an employer's liability for a supervisor's sexual harassment when it has neither knowledge nor notice of the prohibited conduct. This issue must be watched closely for future guidance.

The Supreme Court also ruled that while "voluntary" participation by the victim is not a valid employer defense, an employer may present evidence of sexually provocative dress and speech to defend the charges on the grounds that the harassment was not "unwelcome." Finally, the Supreme Court *strongly* suggests that employers should implement and thoroughly communicate specific policies stressing that sexual harassment will not be tolerated and insure that effective employer grievance mechanisms are available to encourage victims to complain within the organization.

REFERENCES

[1]U.S. Supreme Court Docket No. 84-1979, __U.S. __, 106 S. Ct. 2399 (1986).

[2]*Moire v. Temple University School of Medicine*, 613 F. Supp. 1360, 1366 (D.C. Pa. 1985), *quoting*, C. MacKinnon, Sexual Harassment of Working Women (1979).

[3]The E.E.O.C. has the responsibility of administering Title VII of the Civil Rights Act of 1964 (42 U.S.C.A. §§ 2000(e) to 2000(e)(17)(1981)). Title VII prohibits discrimination in employment, *inter alia*, because of sex. It is established law that sexual harassment is a violation of Title VII. *See, e.g., Katz v. Dole*, 709 F.2d 251, 31 Fair Empl. Prac. Cases 1521 (4th Cir. 1983); *Henson v. City of Dundee*, 682 F.2d 897, 29 Fair Empl. Prac. Cases 787 (11th Cir. 1982).

[4]E.E.O.C., Guidelines On Discrimination Because Of Sex (29 C.F.R. § 1604.11(a)). (The text of the complete guidelines is presented in Appendix A.)

[5]*Miller v. Bank of America*, 600 F.2d 211, 213 (9th Cir. 1979).

[6]*See e.g., Bundy v. Jackson*, 641 F.2d 934 (D.C. Cir. 1981).

[7]*Id.* at 943-44.

[8]*See, e.g., Heelan v. Johns-Manville Corp.*, 451 F. Supp. 1382 (D. Colo. 1978).

[9]*See, supra*, note 6.

[10]411 U.S. 792, 802 (1973).

[11]*Henson v. City of Dundee, supra*, at note 3, 903-05.

[12]BLACK'S LAW DICTIONARY 227 (Rev. 5th ed. 1979).

[13]*McDonnell Douglas Corp., supra*, at note 10, 804.

[14]NOTE, *Sexual Harassment Claims Of Abusive Work Environment Under Title VII*, 97 Harv. L. Rev. 1449, 1456 (1984).

[15]*Id.* at 1456.

[16]*Howard University v. Best*, 36 Fair Empl. Prac. Cases 482, 496 (D.C. Cir. 1984).

[17]*Katz, supra*, at note 3, 256.

[18]42 U.S.C. § 2000e-2(a)(1)(1976).

[19]*Id.* at § 2000e(b).

[20]*Miller, supra*, at note 5, 213.

[21]*Henson, supra*, at note 3, 909.

[22]29 C.F.R. § 1604.11(c).

[23]*See, supra*, note 1.

[24]*See Vinson v. Taylor*, 23 Fair Empl. Prac. Cases 37, 42 (D.D.C. 1980); *rev'd, Vinson v. Taylor*, 753 F.2d 141 (D.C. Cir. 1985), *reh'g denied*, 760 F.2d 1330 (1985), *cert. granted sub nom. PSFS Savings Bank, FSB v. Vinson*, __U.S. __, 106 S. Ct. 57 (1985), *Affirmed and Remanded, Meritor Savings Bank, FSB v. Vinson* (1986).

[25]23 Fair Empl. Prac. Cases at 42, 43 (emphasis added).
[26]*Id.* at 23.
[27]753 F.2d at 150.
[28]*Id.* at 145.
[29]*Id.* at 146.
[30]*Id.*
[31]*Id.* at 150.
[32]*Vinson v. Taylor*, 760 F.2d 1330 (D.C. Cir. 1985).
[33]Bureau of National Affairs, *Sexual Harassment And Labor Relations*, 25 (1981).
[34]29 C.F.R. § 1604.11(d).
[35]*Id.*
[36]*Id.*, § 1604.11(e).
[37]E.E.O.C. Commission Decision 84-3, February 16, 1984.
[38]22 Fair Empl. Prac. Cases 1808 (Minn. 1980).
[39]*Id.* at 1810-11.
[40]*Id.*
[41]*Id.* at 1815.
[42]*Barrett v. Omaha National Bank*, 726 F.2d 424, 427 (8th Cir. 1984).
[43]*Supra*, note 3.
[44]*Id.* at 254.
[45]*Id.*
[46]*Id.* at 256.
[47]*See, e.g., Miller v. Linderwood Female College*, 616 F. Supp. 860 (E.D. Mo. 1985).
[48]20 U.S.C. 1681 et seq. (1976).
[49]U.S. Dept. of Ed., O.C.R., *Sexual Harassment: It's Not Academic* (1984).
[50]*Id.* at 2.
[51]*Id.* at 2-3.
[52]34 C.F.R. § 106.8(b).
[53]*Id.* at § 106.9.
[54]20 U.S.C. § 1682 (1976).
[55]*Cannon v. University of Chicago*, 441 U.S. 677 (1979).
[56]*Alexander v. Yale* 459 F. Supp. 1, 4 (D. Conn. 1979), *aff'd*, 631 F.2d 178 (2d Cir. 1980).
[57]*Moire v. Temple University School of Medicine*, 613 F. Supp.'s 1360, 1366-67 n.2 (D.C. Pa. 1985).
[58]*See, e.g., Shah v. Mt. Zion Hospital & Medical Center*, 642 F.2d 268, 272 (9th Cir. 1981).

Three

Special Policy Considerations for Higher Education

Colleges and universities have a dual responsibility in the prevention of sexual harassment. As employers, they must meet the obligations imposed by the 1980 guidelines issued by EEOC that define sexual harassment and recognize it as a violation of Title VII of the Civil Rights Act of 1964. In addition, institutions of higher education also must provide protection from and access to redress for sexual harassment against students, as suggested in language in Title IX of the 1972 Education Amendments.

In either situation, whether as an employer or as an educator, the institution remains responsible for establishing an harassment-free environment.

Policy Development and Examples

The first step institutions must take to meet the requirement for an environment that is free of sexual harassment is to carefully develop and widely disseminate a policy that prohibits this kind of behavior. While such a policy may not itself prevent incidences of sexual harassment, a strong, well-developed statement that the institution will not tolerate sexual harassment and that violations of this policy may lead to sanctions is extremely valuable to the institution in the event of a complaint.

Various issues should be considered as the policy is developed, including the degree of specificity of definitions and situations of sexual harassment. Many institutions have chosen to use or modify the EEOC guidelines to suit situations involving both students and employees. The following policy is an example of that approach.

Sexual Harassment Policy

I. Policy
It is the policy of the *(name of institution)*, in keeping with efforts to establish an environment in which the dignity and worth of all members of the institutional community are respected, that sexual harassment of students and employees at *(name of institution)* is unacceptable conduct and will not be tolerated. Sexual harassment may involve the behavior of a person of either sex against a person of the opposite or same sex, when that behavior falls within the definition outlined below.

II. Definition
Sexual harassment of employees and students at *(name of institution)* is defined as any unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, when:

A. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment.

B. Submission to or rejection of such conduct is used as the basis for employment decisions affecting that individual.

C. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or educational experience, or creates an intimidating, hostile, or offensive work or educational environment.

III. Complaint Procedures
Persons who feel that they have been sexually harassed under the above definition and wish further information, or assistance in filing a complaint, should contact: _____.

Other institutions have separate policies for employees and for students and also have added the issue of student-to-student sexual harassment to their rules on student behavior, as well as procedures to deal with student harassment of faculty or staff members. An example of an institutional policy written with great specificity and detail, and with clearly defined reference groups, such as students and faculty, follows:

Sexual Harassment: Definitions and Rules Governing the Conduct of Faculty

Part I: Sexual Favors as a Basis for Actions Affecting an Individual's Welfare as a Student or Employee.

I. No member of the faculty shall behave toward another institutional employee or student in any of the following ways:

A. Make or threaten to make submission to or rejection of requests for sexual favors a basis for use of one's status as a member of the faculty to bring about decisions or assessments affecting an individual's welfare as an employee or student.

B. Agree to, or offer to trade sexual favors for, use of one's status as a member of the faculty to bring about favorable decisions or assessments affecting an individual's welfare as a student employee.

Part II: Flagrant or Repeated Sexual Advances, Requests for Sexual Favors, and Physical Contacts Harmful to Another's Work or Study Performance or to the Work or Study Environment.

II. No member of the faculty shall behave toward another institutional employee or student in any of the following ways:
In a work- or learning-related setting, make sexual advances, requests for sexual favors, or physical contacts commonly understood to be of a sexual nature, if

(1) the conduct is unwanted by the person(s) to whom it is directed, and

(2) the actor knew or a reasonable person could clearly have understood that the conduct was unwanted, and

(3) because of its flagrant or repetitious nature, the conduct either

(a) seriously interfered with work or learning performance of the person(s) to whom the conduct was directed, or

(b) makes the institution's work or learning environment intimidating or hostile, or demeaning to a person of average sensibilities.

*Part III: Repeated Demeaning Verbal and Other Expressive Behavior in Noninstructional Settings that is Harmful to Another's Work or Study Performance or to the Work or Study Environment.**

III. No member of the faculty shall in a noninstructional but work- or learning-related setting:

A. Repeatedly address or direct sexual gestures, or sexually explicit comments or gender-related epithets concerning a specific person(s) to an institutional employee(s) or student(s), if the gestures, comments, or epithets

(1) are commonly considered by people of a specific sex or sexual preference to be demeaning to that sex or sexual preference, and

(2) repetition of such conduct either

(a) seriously interferes with the work or study performance of the person(s) to whom the conduct is addressed or directed, or

(b) makes the work or study environment hostile or intimidating, or demeaning to persons of average sensibilities of that sex or sexual preference.

B. Display visual materials, alter visual materials displayed by others, or make statements if

(1) the intent of the actor is to interfere with the work or study performance of an employee or student or to make the work or study environment hostile, intimidating, or demeaning to persons of a particular sex or sexual preference and

(2) such displays, alterations, or statements are commonly considered by persons of a particular sex or sexual preference and of average sensibilities to be demeaning to members of that group, and

(3) the person making the display, alteration, or statement had previously been asked not to engage in such conduct or conduct of substantially the same kind, and

(4) the display, alteration, or statement either

(a) seriously interferes with the work or study performance of an employee or student, or

(b) makes the work or study environment hostile or intimidating, or demeaning to persons of average sensibilities of a particular sex or sexual preference.

Part IV: Demeaning Verbal and Other Expressive Behavior in Instructional Settings.

IV. Discipline of faculty members because of expressive behavior in an instructional setting shall be governed by the following definitions and rules:

A. *Definitions for Purposes of Part IV:*

1. An "instructional setting" is a situation in which

*The following motion was approved by the Senate: That the Senate recommends that the Ad Hoc Committee on Sexual Harassment, in consultation with the Student Conduct Policy Committee and with appropriate student groups, consider further and advise the Chancellor and the committee whether the provisions of Part III should apply to the conduct of one student toward another and whether student expressive behavior in instructional settings should be a basis for discipline.

a member of the faculty is communicating with a student(s) concerning matters the faculty member is responsible for teaching the student(s). These situations include, but are not limited to, such communication in a classroom, in a laboratory, during a field trip, and in a faculty member's office; advising and counseling situations are not included.

2. "Expressive behavior" is conduct in an instructional setting through which a faculty member seeks to communicate with students. It includes, but is not limited to, the use of visual materials, oral or written statements, and assignments of visual or written materials.

B. *Protected Expressive Behavior.*

1. Expressive behavior related to subject matter.

(a) A faculty member's selection of instructional materials shall not be a basis for discipline unless an authorized hearing body finds that the faculty member's claim that the materials are germane to the subject of the course is clearly unreasonable.

(b) If a faculty member claims that expressive behavior constituted an opinion or statement germane to the subject matter of the course in which the behavior occurred, the behavior shall not be a basis for discipline action unless an authorized hearing body finds that the faculty member's claim is clearly unreasonable. Expressive behavior that falls within the prohibition of subsection C.2 below shall not be considered an opinion or statement germane to the subject matter of the course.

2. Teaching techniques not protected under IV.B.1

A faculty member's choice of techniques to accomplish an educational objective shall not be a basis for discipline unless an authorized hearing body finds clearly unreasonable the faculty member's claim that the objective cannot be accomplished as effectively by techniques less likely to cause harm of the kind described in C.1(c) below. If a technique falls within the prohibition of C.2 below, the faculty member's claim shall be found to be clearly unreasonable.

C. *Unprotected Expressive Behavior Subject to Discipline.*

1. A faculty member's expressive behavior in an instructional setting may be the basis for discipline if any claims that the behavior is protected under subsections B.1 or B.2 have been rejected, and

(a) the behavior is commonly considered by persons of a particular sex or sexual preference and of average sensibilities to be demeaning to members of that group, and

(b) the person engaging in such conduct has previously been asked not to engage in such conduct or conduct of substantially the same kind, and

(c) the conduct either

(i) seriously interferes with the academic work of a student(s) in the course, or

(ii) makes the instructional setting hostile or intimidating, or demeaning to students of a particular sex or sexual preference and of average sensibilities.

2. In addition, a faculty member is subject to discipline if, in addressing a student(s) in an instructional setting, he or she repeatedly uses sexual gestures, sexually explicit comments, or gender-related epithets to refer to a student(s) in the course, and if the gestures, comments, or epithets

(a) are commonly considered by people of a specific sex or sexual preference to be demeaning to that sex or sexual preference, and

(b) repetition of such conduct either

(i) seriously interferes with the learning or other academic performance of the student(s) to whom the faculty member referred, or

(ii) makes the instructional setting hostile or intimidating, or demeaning to persons of average sensibilities of that sex or sexual preference.

Clearly, the above example demonstrates the extent to which some institutions have gone in an attempt to deal with First Amendment rights and faculty protections vs. responsibilities.

Consenting Sexual Relationships

A second issue that should be considered during policy development is the thorny question of consenting sexual relationships between student and faculty and/or employee and supervisor. While it is clear that these behaviors may not be expressly prohibited, the appropriate position of the institution regarding such relationships is less clear. This issue is obviously a sensitive one. As intro-

duced in Chapter One, two examples of policies in which institutions have included statements regarding consenting relationships follow:

Relationships Between Individual Faculty Members and Students:

The council discussed various kinds of personal relationships between faculty members and students. Members of the council generally agreed that, in addition to the harassing behavior described below, certain other kinds of relationships are wrong whenever they take place within an instructional context.

Amorous relationships that might be appropriate in other circumstances are always wrong when they occur between any teacher or officer of the institution and any student for whom he or she has a professional responsibility. Further, such relationships may have the effect of undermining the atmosphere of trust on which the educational process depends. Implicit in the idea of professionalism is the recognition by those in positions of authority that in their relationships with students there is always an element of power. It is incumbent on those with authority not to abuse, nor to seem to abuse, the power with which they are entrusted.

Officers and other members of the teaching staff should be aware that any romantic involvement with their students makes them liable for formal action against them if a complaint is initiated by a student. Even when both parties have consented to the development of such a relationship, it is the officer or instructor who, by virtue of his or her special responsibility, will be held accountable for unprofessional behavior. Because graduate student teaching fellows, tutors, and undergraduate course assistants may be less accustomed than faculty members to thinking of themselves as holding professional responsibilities, they would be wise to exercise special care in their relationships with students whom they instruct or evaluate.

Other amorous relationships between members of the faculty and students, occurring outside the instructional context, also may lead to difficulties. In a personal relationship between an officer and a student for whom the officer has no current professional responsibility, the officer should be sensitive to the constant possibility that he or she may unexpectedly be placed in a position of responsibility for the student's instruction or evaluation. Relationships between officers and students are always fundamentally asymmetric in nature.

Consentual Relationships

Consenting romantic and sexual relationships between faculty and student, or between supervisor and employee, while not expressly forbidden, are generally deemed very unwise. Codes of ethics for most professional associations forbid professional-client sexual relationships. In the view of the Senate, the professor-student relationship is one of professional and client. The respect and trust accorded a professor by a student, as well as the power exercised by the professor in giving praise or blame, grades, recommendations for further study and future employment, etc., greatly diminish the student's actual freedom of choice should sexual favors be included among the professor's other, legitimate, demands. Therefore, faculty are warned against the possible costs of even an apparently consenting relationship, in regard to the academic efforts of both faculty member and student. A faculty member who enters into a sexual relationship with a student (or a supervisor with an employee) where a professional power differential exists, must realize that, if a charge of sexual harassment is subsequently lodged, it will be exceedingly difficult to prove immunity on grounds of mutual consent.

The administration and the Sexual Harassment Board involved with a charge of sexual harassment shall be expected, in general, to be unsympathetic to a defense based on consent when the facts establish that a professional faculty-student or supervisor-employee power differential existed within the relationship.

Since a once-consenting relationship turned sour may result in a later allegation of sexual harassment, it is important that institutions make clear that immunity due to previous consent will not be allowed.

Summary

Finally, care must be taken to insure that all students and employees have access to the institutional policy. New employees may receive copies along with orientation materials; copies may be distributed to all existing employees; and the policies may be presented in catalogues, books, or informational literature of the institution. Along with the policy, information on both formal and informal complaint procedures should be given to all employees and students. For more examples of policy statements, see Appendix C.

Four

Procedures For Dealing With Sexual Harassment

Grievance or complaint procedures, while not necessarily required under either Title VII or Title IX, provide an opportunity for an organization to resolve allegations internally. Most employers have established procedures for complaints of discrimination on the basis of race, sex, handicap, national origin, etc., and these may be adapted to include complaints of sexual harassment.

Formal Procedures

Typically, extant grievance procedures fall into the category labeled "formal." This label usually means that possible resolution comes by means of hearing bodies or boards with well-defined timelines, by legal or quasi-legal processes, and with resultant findings and appeal routes described in detail.

If the procedures have been in place for some time, it is a good idea to reevaluate them prior to re-issuing information on their use in allegations of sexual harassment. Such reevaluation should include the following questions:

- Does the process provide the aggrieved employee the opportunity to fully state his or her case?
- Is there an assurance of due process for both parties?
- Is the process timely?
- Is there provision for resolution at the earliest possible level?
- Are steps constructed with access to appropriate appeals and reviews?
- Is a promise of confidentiality included?
- Will legal counsel be permitted for both sides; if so, at which steps of the process?
- Is freedom from retaliation assured for the complainant?

If, after reevaluation, the formal procedures appear to satisfy criteria used to determine appropriate response, there may be no need to issue new procedures specific to complaints of sexual harassment.

Informal Complaint Procedures

It is within the area of efforts known as *informal procedures* that the most flexibility can be found. This process is also known as "fact finding," "mediation," or "counseling," depending on organizational definition. Generally, the process includes efforts by "intake" or "entry-level" persons to counsel employees, to provide information, and to resolve any problem at the earliest possible level. Very often employees are encouraged to use an informal mechanism prior to consideration of filing a complaint with the appropriate formal board or hearing body.

There are various roles that can be played by persons designated to do sexual harassment intake: they may do fact finding in order to present a case for formal hearing when appropriate; they may fact-find and then present recommendations to an appropriate administrator/manager for sanctions; or they may arrange for a written statement of agreement acceptable to both parties without an indication of findings.

Whenever possible, care should be exercised to effect an informal resolution of the complaint; one that is acceptable to both parties. Cases that involve allegations of sexual harassment are especially sensitive and special attention should be given to the issue of privacy for all individuals. Information should be released only on a need-to-know basis. However, confidentiality should not be promised; neither the complainant nor the accused should expect that, should a complaint require investigation, there is the possibility of confidentiality.

Issues To Be Addressed

Other issues must be addressed as the informal mechanism is developed. The first step is to decide whether a complaint—even in informal procedures—should be documented in writing. Initial discussion with the complainant does not require a written record, and frequently such interaction will lead to the complainant deciding to deal with the situation directly. Should a complainant decide

to proceed with an investigation, however, a written statement should be required.

A second concern has to do with access to the resolution procedures. Smaller organizations may find that identifying one person or office as intake for sexual harassment complaints is sufficient. Larger, more complex organizations might wish to consider designating a person in each unit as intake or complaint coordinator. Regardless of approach, in order to meet the suggestion of resolution at the earliest possible level, training of employees is necessary. If multiple access is the choice, fairly detailed information is needed on the nature of sexual harassment, on how to investigate cases, and on legal and organizational liability. In addition, there should be good record-keeping and reporting systems. If single access to sexual harassment complaint resolution is more appropriate, the employer still needs to inform supervisors of their responsibilities.

It is essential that the person responsible for resolution of complaints recognize the need for impartiality. One can not routinely advocate for the complainant nor defend the respondent or the organization without serious loss of effectiveness. If support for complainants is a problem, advocacy groups may be established separately from the intake person or office.

Of concern both in policy development and in procedures is whether or not to include position statements regarding response to anonymous or third-party complaints. Anonymous charges should not be the basis of any administrative actions nor placed in anyone's personnel files. Persons so charged should be notified, but told that anonymous complaints will not be a part of their record. Third-party complaints should be examined for legitimacy and damages suffered by the complainant due to a consenting relationship between supervisor and another employee or student. This kind of complaint may be handled more appropriately under affirmative action procedures than by sexual harassment procedures, if such distinctions are available.

The Investigation

Once a written complaint has been received, it is very important to respond quickly. The allegation probably will not go away by itself and delay in response can only exacerbate the situation. Initial interviews with the complainant should focus on eliciting factual information, as such data forms the basis on which decisions are made to proceed with an investigation.

All interviews, telephone calls, or any other administrative activities responsive to the complaint must be carefully documented. It is very important to date everything so that it is clear that the organization views its responsibilities seriously. Notes of interviews and meetings should be prepared contemporaneously.

If it is at all possible, two persons should interview both parties to the complaint and any witnesses or persons having knowledge of the situation. In the event that information obtained may be disputed later, a second set of notes becomes invaluable. Care must be taken that neither interviewer can be accused of any bias.

While it is in the best interest of everyone involved to reach an early, informal resolution, neither party should be pressured into a premature or unacceptable agreement. It is essential that the facts of the case be established and that attempts are made to discover what the complainant wants in redress for the grievance. While informal resolution is generally less traumatic for everyone involved, no complainant should be denied access to formal procedures if he or she so desires.

Reports of Findings

At the end of the investigation there are two basic options: (1) no violation of sexual harassment policy or (2) suspected or probable cause violation of policy. The first is relatively straightforward, the judgment being that the allegations do not have substance and the complaint is without merit. With this option, the parties involved are notified and the complainant is advised that if he or she is dissatisfied with the decision there are additional internal or external appeal route(s).

With a probable-cause finding, other options become available, depending on the organization's procedures. The complainant may be referred to a hearing board or committee for formal review; the results—including the evidence supporting the finding as well as the nature of the violation—may be presented to the appropriate administrator or manager with a request that sanctions be imposed; or, the two parties may resolve the problem in a written statement of agreement acceptable to both persons.

There are strengths and weaknesses in each approach. Use of a hearing board means essentially moving the complaint from informal to formal status. In higher education, this option meets the suggestion for review by peers from the American Association of University Professors (AAUP). However, it should be noted that generally the use of

formal procedures means that any privacy for the parties no longer will be possible.

Use of the option which has the line supervisor or administrative officer imposing sanctions, based on results of an informal review, may lead to charges that the investigator acted as judge, jury, and executioner. If the facts of the case are in dispute, this option may be fraught with accusations of bias from reviewers on both sides. It is essential, therefore, that the report be clear and substantive and based on a thorough, unbiased review. Information on appeal routes should be made available to both parties when this option is used.

A written statement of agreement between parties keeps resolution in the informal mode. It is the most flexible and most private of the options. When facts are not disputed and the persons involved can agree to written terms of resolution, this option can be used very effectively.

Sanctions or Disciplinary Actions

Violation of policies on sexual harassment may lead to a variety of sanctions. Included in the list of possible disciplinary actions are written or oral reprimands, suspensions with or without pay, denial of merit salary increase, termination, and/or referral to the criminal system for possible sexual assault violation. It is important that sanctions be based on violations of stated policies. Sanctions should be appropriate to the nature and severity of the offense and when possible should reflect "progressive discipline."

Examples of sanctions based on progressive discipline include:

Step 1: First and/or "minor" offense. Generally this requires either a verbal or written reprimand. Often a letter of reprimand is placed in the harasser's personal file for a predetermined period (usually one to two years). If no additional probable cause findings are made within that period, the letter is removed.

Step 2: Letter of reprimand plus suspension without pay or leave of absence without pay.

Step 3: Termination of employment of harasser.

Occasionally, following a probable cause finding, the harasser is given an opportunity to quietly resign as an alternative to organizational sanction. A bargain is struck that no information about the incident will be made available if the harasser resigns. While this may seem to be an easy resolution, it fails significantly in that, by itself, it does not provide any appropriate redress for the victim. In addition, the harasser is free to repeat the harassing behavior elsewhere without fear of sanction.

Record Keeping

What information is kept, how it is kept, and to whom it can be made available are among the most sensitive and problematic issues in sexual harassment resolution. It is clear that requests for information or advice and/or counseling need not result in record keeping other than numerical counts if so desired. The keeping of records in any form other than the aggregate presents confidentiality problems for the institution. Once a complainant either reports an incident or files a complaint, the need for some form of record keeping becomes an issue.

A variety of formats is used in developing records. Most common are forms filled out by complainants that provide information necessary to begin a fact finding or investigation of the charges. Examples of such forms are found in Appendices D, E, and F. (Appendix G suggests actions that can be followed by alleged victims of sexual harassment.)

It is important that a developing file include contemporaneous notes of interviews done by the investigator(s). In the event of later dispute over any facts in the case, such notes become extremely important. Since in most cases such files are subject to subpoena, it is essential that they be an accurate reflection of the facts, without opinion or personal judgment of the investigator.

How this information is kept, and who has access to it, must be carefully considered. The organization's policy regarding record keeping must be consistent and legally defensible.

Summary

As stated in Chapter Two, the U.S. Supreme Court, in its decision on *Meritor Savings Bank FSB., v. Vinson,* encouraged organizations to make available effective internal grievance mechanisms. Formal, as well as informal, complaint procedures, investigations and resolutions, sanctions or disciplinary action, reports of findings, and record keeping are all important matters to be addressed by the employer.

Five

Training: The Key to Prevention

It has long been recognized that an organization is responsible for the acts of its agents in carrying out its day-to-day activities. However, until November 10, 1980, sexual harassment was not an area in which the organization's exposure to the activity not only of its agents, but also of employees and nonemployees towards employees and others, was emphasized. With the final EEOC guidelines on sexual harassment, a new organizational emphasis on prevention was mandated. This emphasis has not lessened but continues to present employers with dilemmas in addressing various mechanisms for enhancing their success in preventing sexual harassment from occurring in the workplace.

Training and employee-development curricula never have claimed to solve all problems for all situations that occur in the workplace. Training is, however, a proven mechanism for promoting an organization's policies and procedures, while increasing the awareness of managers and supervisors of their roles and obligations under these policies. An organization's policies of prevention of sexual harassment in the workplace ideally can be presented through a well-designed training program. The organization has a responsibility to insure that all employees are correctly informed of the organization's policies, as well as of all federal, state, and local regulations and laws related to sexually harassing activity in the workplace.

Developing a Sound Training Program

A sound training program should begin with the organization's policy emphasis and the manager's and supervisor's role in policy implementation. The complete background of the legislative and regulatory history of the EEOC Sexual Harassment Guidelines should be presented. Mechanisms for identifying potentially sexually harassing behavior and situations should be addressed and guidelines and methods for prevention should be stressed. It is only through renewed awareness that problems can be prevented. Good management principles demand that organizations be proactive rather than reactive to potential liabilities.

As with other types of training, the development and implementation of a "Sexual Harassment Prevention Program" requires the full philosophical commitment of the senior managers of an organization. Without this commitment, a training program could scarcely have an impact on the organization's constituency. Any process used to gain support for a training program should include three basic elements: an assessment of need, outcome, and cost.

1. *Assessment of need.* Basically an assessment of need answers the question, "Why is this training program important to the organization?" In the case of a sexual harassment prevention program, the answer certainly would take into account the possible future financial liability incurred by an organization that does not have supervisors and managers who are well trained in the prevention of sexual harassment. It also would consider reduced employee morale and would speak to the dollars expended as a result of turnover and to the adverse publicity an organization might receive if a violation should occur. In addition, training for prevention of sexual harassment should be viewed in light of EEO/AA commitments.

2. *Outcome.* What are the desired results and how will they be measured? In today's economy, increased emphasis is placed on measurable results of training programs, since the dollars expended must yield a return on investment. Objectives of a prevention program must be clear and attainable. It is virtually impossible to gauge with 100 percent accuracy a prevention program's effectiveness, as it is difficult to measure the number of potential problems that are avoided because of the training. If an organization has prior experience of sexual harassment, it can statistically monitor the increase

or decrease in claims activity over a period. Results such as these are important to continued support by senior managers.

3. *Cost.* Cost should be calculated not only in terms of direct dollars for materials, supplies, audiovisuals, and rental space, but also in terms of personnel cost, time invested, etc.

In-House Training or Packaged Program

Once a prevention program has been accepted by senior managers and has received the appropriate organizational approvals, a decision must be made as to whether to develop a program in-house or to seek a packaged or "canned" program that will meet the organization's specific structure, personality, and complexity. There are a number of packaged programs available on the market at varying cost (see Appendix H). To make this decision, an organization should consider five major factors:

1. Does the organization have a training staff large enough to provide training services on an ongoing basis with necessary back-up?
2. Is the training staff sufficiently well-schooled in sexual harassment laws and regulations and prevention techniques?
3. Are there financial resources available to send managers, supervisors, and employees to outside training programs, to buy a packaged program for in-house use, or to hire a consultant to provide the training services?
4. Is there a program package available that satisfies all the organization's needs for education in the sexual harassment arena? (See Appendix H.)
5. Is there a program package available that allows for updating on a regular basis? (See Appendix H. Refer to Appendix I for a bibliography of books, articles, and other such sources.)

Types of Training Programs

Many companies and institutions of higher education have initiated detailed training programs that address sexual harassment both for managers and supervisors and for employees. The typical program addresses the appropriate legislation and court cases and their history; organizational policy, means for recognition of a harassing activity; methods for dealing with specific occurrences, such as language, pictures, policies, etc.; awareness raising; complaint procedures; and other topics that may be applicable to the organization.

For colleges and universities, addressing sexual harassment as it relates to student involvement, patient care at medical centers, and dealing with outside vendors requires specific attention. One institution has successfully tied together brochures, films, and training in a program for the faculty-student area that examines the ways curricula can be handled to alleviate any potential harassing situations. Another institution has received national recognition for its EEO/AA training module, which includes a three-hour session on prevention of sexual harassment.

Training Used for Correction

Whatever the program selected, the principal objective should be to insure that organizational goals are met. Training is not merely a preventive measure, but also can be used to correct current problems. Courts, as well as grievance committees, have ordered training of individuals involved in sexual harassment cases as one type of remedy. For example, as a result of a court order in a particular case, a major military facility hired a consultant to train women at the facility in "How To Say No and Keep Your Job." A major university requires specialized training of all individuals involved in a sexual harassment case, whether reasonable cause is found or not.

Summary

Thus, having a training program may well be the best defense for an institution in a sexual harassment case, both as a preventive measure and as a remedy. Training has been shown to be an effective method for an organization to insure that all steps necessary to prevent sexual harassment from occurring have been taken and to sensitize managers, supervisors, and employees to the organization's policies and procedures and to the laws and regulations governing the occurrence and prevention of sexual harassment. By providing appropriate training, the institution can apprise both managers and employees, as well as other potential victims, of methods for handling situations involving harassing behavior. Training can stop such behavior, provide coping mechanisms, and offer individuals a means of differentiating true sexually harassing activity from behavior that is not so intended. Training can help to eliminate an environment that encourages situations of sexual harassment.

Appendices

E.E.O.C. Guidelines On Discrimination Because of Sex

(a) Harassment on the basis of sex is a violation of Sec. 703 of Title VII.[1] Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

(b) In determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case-by-case basis.

(c) Applying general Title VII principles, an employer, employment agency, joint apprenticeship committee or labor organization (hereinafter collectively referred to as "employer") is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job junctions [sic] performed by the individual in determining whether an individual acts in either a supervisory or agency capacity.

(d) With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action.

(e) An employer may also be responsible for the acts of nonemployees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such nonemployees.

(f) Prevention is the best tool for elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

(g) Other related practices: Where employment opportunities or benefits are granted because of an individual's submission to the employer's sexual advances or requests for sexual favors, the employer may be held liable for unlawful sex discrimination against other persons who were qualified for but denied that employment opportunity or benefit.

[1]The principles involved here continue to apply to race, color, religion, or national origin.

Sexual Harassment Cases Cited in Chapter II

UNITED STATES SUPREME COURT:

Cannon v. University of Chicago, 441 U.S. 677, 99 S. Ct. 1946 (1979).

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973).

DISTRICT OF COLUMBIA CIRCUIT:

Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981).

Howard University v. Best, 36 Fair Empl. Prac. Cases 482 (D.C. Cir. 1984).

Vinson v. Taylor, 23 Fair Empl. Prac. Cases 37 (D.D.C. 1980), *rev'd*, 753 F.2d 141 (D.C. Cir. 1985), *cert. granted sub nom. PSFS Savings Bank v. Vinson*, __U.S. __, 106 S. Ct. 57 (1985)., __ U.S. __(1986).

1ST CIRCUIT—MAINE, NEW HAMPSHIRE, MASSACHUSETTS, RHODE ISLAND, PUERTO RICO

2ND CIRCUIT—VERMONT, NEW YORK, CONNECTICUT

3RD CIRCUIT—PENNSYLVANIA, NEW JERSEY, DELAWARE, VIRGIN ISLANDS

Moire v. Temple University School of Medicine, 613 F. Supp. 1360 (D.C. Pa. 1985)

4TH CIRCUIT—VIRGINIA, WEST VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA, MARYLAND

Katz v. Dole, 709 F.2d 251, 31 Fair. Empl. Prac. Cases 1521 (4th Cir. 1983).

5TH CIRCUIT—TEXAS, LOUISIANA, MISSISSIPPI, ALABAMA, GEORGIA, FLORIDA, CANAL ZONE

6TH CIRCUIT—MICHIGAN, OHIO, KENTUCKY, TENNESSEE

7TH CIRCUIT—WISCONSIN, ILLINOIS, INDIANA

8TH CIRCUIT—MISSOURI, IOWA, ARKANSAS, NORTH DAKOTA, SOUTH DAKOTA, MINNESOTA, NEBRASKA

Barrett v. Omaha National Bank, 726 F.2d 424 (8th Cir. 1984).

Miller v. Linderwood Female College, 616 F. Supp. 860 (E.D. Mo. 1985).

9TH CIRCUIT—CALIFORNIA, ARIZONA, NEVADA, WASHINGTON, OREGON, IDAHO, MONTANA, ALASKA, HAWAII, GUAM

Miller v. Bank of America, 600 F.2d 211 (9th Cir. 1979).

Shah v. Mt. Zion Hospital & Medical Center, 642 F.2d 268 (9th Cir. 1981).

10TH CIRCUIT—WYOMING, UTAH, COLORADO, NEW MEXICO, KANSAS, OKLAHOMA

Heelan v. Johns-Mansville Corp., 451 F. Supp. 1382 (D. Colo. 1978).

STATE COURT DECISIONS

Continental Can Co. v. State Of Minnesota, 22 Fair Empl. Prac. Cases 1808 (Minn. 1980).

FACULTY-STUDENT HARASSMENT

Alexander v. Yale University, 459 F. Supp. 1 (D. Conn. 1979), *aff'd*, 631 F.2d 178 (2d Cir. 1980).

Moire v. Temple University School of Medicine, 613 F. Supp. 1360 (D.C. Pa. 1985).

Sample Policies on Sexual Harassment

(NOTE: Two sample policies, as used in institutions of higher education, are included in Chapter Three, "Special Policy Considerations for Higher Education." The examples in this appendix are taken from business, industry, and the federal government.)

Sample Policy C-3

To All Officers:

System and company policy decrees that all employees have a right to work in a discrimination-free environment. This encompasses freedom from sexual harassment.

Our policy regarding sexual harassment is as follows:

> The company prohibits sexual harassment of its employees in any form. Such conduct may result in disciplinary action up to and including dismissal.
>
> Specifically, no supervisor shall threaten or insinuate, either explicitly or implicitly, that an employee's refusal to submit to sexual advances will adversely affect the employee's employment, evaluation, wages, advancement, assigned duties, shifts, or any other condition of employment or career development.
>
> Other sexually harassing conduct in the workplace, whether committed by supervisors or by non-supervisory personnel, also is prohibited. This includes: offensive sexual flirtations, advances, or propositions; verbal abuse of a sexual nature; graphic verbal commentaries about an individual's body; sexually degrading words used to describe an individual; and the display in the workplace of sexually suggestive objects or pictures.

This policy will be communicated via an FY1 to be issued to all employees. Also, it will point out that employees who have complaints of sexual harassment should, in appropriate circumstances, report such conduct to their supervisors. Or, if this is not appropriate, employees may seek the assistance of company compliance managers. Where investigation confirms the allegation, prompt corrective action should be taken.

Your personal support of this policy is important to maintaining an environment that is free from sexual harassment.

Vice President
Human Resources

Sample Policy C-4

To: Home Office Senior Officers and Supervisory Associates
RE: Sexual Harassment Policy

Each of you is aware of the broad sweep of equal employment opportunity legislation and guidelines. All company employees received a letter from the president on this subject in May. It is of particular importance, however, that all employees who direct the activities of others understand that these guidelines specifically include sexual harassment. This is defined in the attached Federal Guidelines on Sexual Discrimination issued by the EEOC, April 1980, as follows:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either

explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

The company is in full agreement with the intent of these sex discrimination guidelines because effective working relationships between employees must be based on mutual respect. Therefore, actions that are counter to these guidelines are also counter to the company's position as an organization.

Until recently, most people were unaware of the existence of sexual harassment in the workplace, or viewed it as something that wasn't so bad—something that society accepted, condoned and put up with as "just part of the job." But recent studies have defined it and have shown that the effects of sexual harassment on its victims can be devastating: alcoholism, excessive drug use, family disruptions, psychosomatic illness, mental illness, work absenteeism, negative work attitudes, depression, poor motivation, nervousness, hostility, chronic fatigue, loss of strength, sleeplessness, and lowered self-confidence and self-esteem.

As part of your responsibility in directing the work of others, you are accountable for taking action to prevent the occurrence of sexual harassment in your area. If you receive any complaints or if any problems arise in your area with respect to matters covered by these guidelines, please notify the associate director of equal opportunity programs so that she may work together with you to take appropriate corrective action. Further, please contact her for assistance if you have questions regarding this issue.

Senior Vice President

Sample Policy C-5

Federal employees have a grave responsibility under the federal code of conduct and ethics for maintaining high standards of honesty, integrity, and impartiality in conduct to assure proper performance of the U.S. government's business and the maintenance of confidence of the American people. Any employee conduct that violates this code cannot be condoned.

Sexual harassment is a form of employee misconduct that undermines the integrity of the employment relationship. All employees must be allowed to work in an environment free from unsolicited and unwelcome sexual overtures. Sexual harassment debilitates morale and interferes in the work productivity of its victim and coworkers.

Sexual harassment is a prohibited personnel practice when it results in discrimination for or against an employee on the basis of conduct not related to performance, such as the taking or refusal to take a personnel action, including promotion of employees who submit to sexual advances or refusal to promote employees who resist or protest sexual overtures.

Specifically, sexual harassment is deliberate or repeated, unsolicited verbal comments, gestures, or physical contacts of a sexual nature that are unwelcome.

Within the federal government, a supervisor who uses implicit or explicit coercive sexual behavior to control, influence, or affect the career, salary, or job of an employee is engaging in sexual harassment. Similarly, an agency employee who behaves in this manner in the process of conducting agency business is engaging in sexual harassment.

Finally, any employee who participates in deliberate or repeated, unsolicited verbal comments, gestures, or physical contacts of a sexual nature that are unwelcome and interfere with work productivity also is engaging in sexual harassment.

It is the policy of the office of personnel management (OPM) that sexual harassment is unacceptable conduct in the workplace and will not be condoned. Personnel management within the federal sector shall be implemented free from prohibited personnel practices and consistent with merit system principles, as outlined in the provisions of the Civil Service Reform Act of 1978. All federal employees should avoid

conduct that undermines these merit principles. At the same time, it is not the intent of OPM to regulate the social interaction of relationships freely entered into by federal employees.

Complaints of harassment shall be examined impartially and resolved promptly. The Equal Employment Opportunity Commission will be issuing a directive that will define sexual harassment prohibited by Title VII of the Civil Rights Act and distinguish it from related behavior that does not violate Title VII.

Sample Policy C-6

It is the policy of this corporation that all our employees should be able to enjoy a work environment free of discrimination and harassment.

Harassment refers to behavior that is personally offensive, impairs morale and interferes with the work effectiveness of employees. Any harassment of employees by other employees will not be permitted, regardless of their working relationship.

This policy refers to, but is not limited to, harassment in the following areas: (1) age, (2) race, (3) color, (4) national origin, (5) religion, (6) sex, (7) handicap, and (8) veteran status. Such harassment includes unsolicited remarks, gestures, or physical contact; display or circulation of written materials or pictures degrading either to gender or to racial, ethnic, or religious groups; and verbal abuse or insults directed at or made in the presence of members of a racial, ethnic, or minority group.

Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct that is both sexual and offensive in nature. Sexual harassment undermines the employment relationship by creating an intimidating, hostile, or offensive work environment.

In determining whether alleged conduct is sexual harassment, the nature of the sexual advances and the context in which they supposedly occurred must be examined.

Individuals who believe they have been subjected to harassment from either a coworker or a supervisor should make it clear that such behavior is offensive to them. If the behavior continues, they should bring the matter to the attention of the appropriate manager and/or their personnel representative.

In fulfilling their obligation to maintain a positive and productive work environment, managers and supervisors are expected to halt any harassment of which they become aware by restating the company policy and, when necessary, by more direct disciplinary action.

Complaint/Grievance Form

Date: _____

A. 1. Name: _____ Telephone: _____

2. Street Address: _____

3. City and State: _____ Zip Code: _____

B. Type of alleged discrimination:

1. Race or color _____ 2. Religion _____ 3. Age _____

4. National origin _____ 5. Handicap _____ 6. Sex _____

7. Other (please specify) _____

C. Summary of alleged complaint: _____

_____

_____

_____

1. Dates on which alleged complaint occurred: _____

2. Any other employees involved: _____

D. What unit supervisor, or other employee discriminated against you?

1. Unit: _____

2. Name of person (if known) _____ Telephone: _____

3. Address: _____

4. City and State: _____ Zip Code: _____

E. What action, if any, has been taken so far? _____

_____

F. What action (if any) do you suggest we take at this time? _____

_____

G. Have you filed a complaint/grievance with any other agency? _____

If yes, with whom: _____

(If additional writing space is needed, you may write on the reverse side of this form or attach additional sheets.)

_____
Signature of Complainant

Sexual Harassment Investigation Checklist for Managers

I. Name of complainant (at least first name, if the person wishes to remain anonymous)
II. Position
III. What happened? (questions for the complainant)
1. WHO harassed you? (No name is needed yet, but the role of the person is an important element, for example, supervisor or fellow employee.)
2. HOW did the harassment take place? (Try to get a very explicit description of the alleged harassing action. This is sometimes quite difficult because the victim is often embarassed by the event.)
3. WHERE did it take place?
4. WHEN did it take place? (date and time, if possible)
5. If more than once, HOW OFTEN?
6. How did you FEEL about it? What was your RESPONSE?
7. In what way does the alleged harasser have POWER over the success (or other well-being) of the harassed?
—at the present time?
—in the future?
8. Were there any WITNESSES? If YES, WHO?
9. Did you tell anyone about your experience after the incident?
If YES,
WHO?
WHEN?
WHERE?
WHAT DID YOU TELL HER OR HIM?
WHAT WAS HER OR HIS RESPONSE?
10. Do you think there might be OTHER VICTIMS?
11. Do you have, or think that you can discreetly obtain, KNOWLEDGE OF OTHER INCIDENCES of sexual harassment by the alleged harasser?
12. Do you know of (or perceive) any CONSEQUENCES or effects of your response?
—Were they explicitly stated? How?
—Implied? How?
13. If some time has elapsed since the incident, have any CONSEQUENCES occurred? What? How?
14. What would you like to have DONE?
—for you?
—for others?
—with respect to the alleged harasser?

IV. Key decisions (for investigators)
Has sexual harassment occurred? (If yes, continue; if no, go to "Options to proceed from here".)
How severe is the harassment?
Does it warrant emergency action?
Does the matter seem suitable for informal resolution?
What is the potential for retaliation?
Can I protect the complainant? (be realistic!)
How?
How can the complainant protect her- or himself?
What options is the complainant *willing* to pursue?

V. Consultation/referral/instructions (to the complainant)
Options to proceed from here
—If there is no harassment—how to counsel the employee
—If there is likelihood of harassment—
internally: what can employee do independently; what are the company's third-party processes?
externally: legal options outside the organization, i.e., EEOC, State Human Rights/Civil Rights Commissions

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From: *A Resource Manual on Sexual Harassment*, New Hampshire Commission on the Status of Women, Sexual Harassment Task Force, 1983, and for that text, adapted from Miranda Associates.

Model Questionnaire on Sexual Harassment

1. Have you been subjected to sexual harassment while working for this organization? ( )
   (If no, skip to Question 8.)
2. If yes, what did you encounter? (Check as appropriate)
   - Sexual relations I did not want. ( )
   - Physical contact I did not want. ( )
   - Annoying or degrading comments about my body. ( )
   - Annoying or degrading remarks about sex. ( )
   - Pressure to engage in sexual activity, but without job-related threats. ( )
   - Threats or suggestions that my job, working conditions, etc., depended on submitting to sexual demands. ( )
   - Other kinds of threats to get me to submit to sexual demands. ( )
3. Who harassed you?
   - Coworker ( )
   - Supervisor or boss ( )
   - Client or customer ( )
4. What action did you take to end the harassment? If none, why?

   _____

   _____

5. Did the harassment stop when you objected to it? Y N
6. Would you have filed a complaint if there had been a procedure for you to do so? Y N
7. Were you penalized in any way for objecting or complaining? If yes, how? Y N

   _____

8. Do you know of anyone who works here who has been harassed and was afraid to object or complain? Y N
   Was the victim male or female? M F
9. Do you think this is a problem that this organization needs to address? What suggestions do you have? Y N

   _____

10. Has harassment or your fear of it distracted you from work and reduced your efficiency? Y N
11. Are you male or female? M F

Recommended Actions To Be Followed By Alleged Victims of Sexual Harassment

This list assumes that you recognize that you are a victim of sexual harassment. You will need to decide which strategy is most important for you at this time. Probably all of these will be necessary sooner or later.

1. Confront Your Harasser

No doubt you have tried ignoring or avoiding the harasser and it has not worked. Confront the person in as forceful a way as possible. Say "NO" and inform the harasser that offensive comments, actions, etc. are not welcome. Do this verbally or in writing and keep copies.

In writing a letter, keep it polite and low-key. Mary Rowe in her article "Ideas for Action," which appears in *The Harvard Business Review*, May-June 1981, recommends three essential parts:

a. A detailed statement, including a precise rendition of all facts and dates relevant to the alleged harassment.
b. A description of your feelings and the impact of the harassing behaviors or actions on your productivity, career objectives, and physical and mental health. Include examples of perceived and actual costs (such as absenteeism) as well as damages.
c. A short statement describing your expectation that the offensive behaviors and actions will stop.

2. Keep Records

Document everything in writing, on tape, or tell a friend. Indicate dates, witnesses, the nature of the behavior (be specific) and include action that you have taken to resolve the problem.

3. Find Witnesses or Colleagues Who Will Corroborate Your Experiences

Many harassers are repeaters. Share your experience with coworkers. Inquire as to whether they have been harassed and if so, what actions have been taken. Ask if they'll support you, if you decide to take action. Two accusations are *much* harder to ignore than one.

4. Get Emotional Support

Recognize that you are faced with a crisis that can damage your health, self-confidence, and career. Choose your help carefully. Many men and women, including professional therapists and counselors, will not understand your predicament.

5. Research Your Options

If the behavior continues, send a second letter explaining what must be done differently. If this fails to discourage the offender, contact your supervisor, affirmative action officer, or other appropriate staff member and seek advice. Other options to be exhausted before filing a formal complaint are:

a. *Within the Workplace.* Examine complaint procedures. Find out what you can about the harasser's supervisors and the personnel operation. Discuss strategy with someone in the company (see preceding paragraph) you can trust. If you end up in legal proceedings, it is vital to have followed the correct "channels."
b. *Through Your Union or Professional Association.* If you don't want to talk to your closest representative, try talking with a woman officer. If you're not affiliated, try to get helpful advice from a working woman's organization.
c. *Through the Legal System*
   i. Call a women's legal center or an attorney that you know.
   ii. Call your state commission on human rights/civil rights to discuss your situation and how to file a complaint under sex discrimination.

Be sure to document all these contacts in your written or taped records. If you are reticent or reluctant to initiate any action with an alleged harasser, seek help from your supervisor or appropriate staff member.

Recognize that as an individual you may be adversely affected. You may eventually have to leave, be fired, be branded a troublemaker, or otherwise be punished. Plan accordingly, but recognize too that by dealing with the problem, you may help make working life better for everyone from this day on.

From: ***A Resource Manual on Sexual Harassment***, New Hampshire Commission on the Status of Women, Sexual Harassment Task Force, 1983, and for that text, adapted by Dr. Mary Stuart Gile from a paper entitled "Dealing with Sexual Harassment–A Strategy Checklist" by Patricia Cresta.

Films on Sexual Harassment

The Workplace Hustle

Producer: Clark Communications, Inc. (CLRKCO)
Distributor: MTI Teleprograms (MTI)
3710 Commercial Avenue, Northbrook, IL 60062

Media Type: 16MM Film Optical Sound

Explores the issue of sexual harassment of women in the workplace. Features Lin Farley, an expert on the topic, and actor Ed Asner.

Preventing Sexual Harassment

(From the Fair Employment Practices Series)

Producer: BNA Communications Inc. (BNA)
Distributor: BNA Communications Inc. (BNA)
9439 Key West Avenue, Rockville, MD 20850

Media Type: 16MM Film Optical Sound

Explores sexual harassment from innuendo to blatant attack, presenting vignettes based on actual cases. Points out management responsibilities and employee rights, provides guidelines for dealing with incidents involving sexual harassment, emphasizes the need to act promptly and correctly, and stresses the importance of practicing the principles of good management to prevent such incidents in the first place.

Boomerang II—Public Sector, Module 3—Supervision

(From The Boomerang II—Public Sector Series)

Producer: BNA Communications Inc. (BNA)
Distributor: BNA Communications Inc. (BNA)
9439 Key West Avenue, Rockville, MD 20850

Media Type: 16MM Film Optical Sound

A management training program on equal employment opportunity, focusing on the public sector. Highlights those aspects of the manager/employer relationship, including issues of sexual harassment, which present potential EEO concerns. Demonstrates appropriate management skills as a means of problem prevention.

The Power Pinch: Sexual Harassment in the Workplace

Author: Peter Schnitzler
MTI Teleprograms, Inc.
3710 Commercial Avenue, Northbrook, IL 60062

In this 26-minute color film, narrator Ken Howard discusses what constitutes sexual harassment and the ramifications for corporations, such as expensive litigation, low morale and productivity, and poor public relations. Case studies, dramatizations, and interviews are included.

Women Under Fire

Author: Chaz Crompton
WHA Television: Programming Department
821 University Avenue, Madison, WI 53706

This 22-minute film is an indepth look at the experiences of the first eight women to work for the Madison, Wisconsin, fire department in its 142-year history. The women talk about job requirements, testing, training, and the pressures of being women in a male-dominated job. Views on the subject, both in support of the women and opposed to them, are expressed by several active and retired male firefighters.

Effective Management Strategies: Preventing Sexual Harassment

Author: Dan Satorius
Mary Belfry and Associates
5231 Edina Industrial Boulevard, Edina, MN 55435

Videotape 3/4, b, trainer's guide, participants' workbook

In this 25-minute videotape, a male narrator introduces an examination of the different socialization and resulting attitudes of men and women. Four vignettes depict instances of sexual harassment in a variety of settings: by a coworker, in the factory, with a secretary, and at an awards ceremony. The program shows both overt harassment, combined with racial slurs, and more subtle types of harassment.

Talking About . . . Women Workers

Author: Morten Parker
Film Department, Walter P. Reuther Library, Wayne State University
5401 Cass Avenue, Detroit, MI 48202

This 30-minute film contrasts the comments of men and women union members on topics including why women work, sexual harassment, marriage and family, and equal opportunity on the job. A wide

range of people of various ages, ethnic backgrounds, and job titles is included.

No Laughing Matter: High School Students and Sexual Harassment

Distributor: Massachusetts Bureau of Educational Resources and Television
75 Acton Street, Arlington, MA 02174 (telephone 617-641-3710)

Fair Employment Practice Program

The Outstanding EEO Multimedia Program for BNAC.

Five films dramatize EEO incidents that actually happened while accompanying manuals reinforce and expand on points made in the film. The "Primer of Equal Employment Opportunity" gives an overview of the regulations. Together they enable managers and supervisors to explore the basic premises of the regulations and find out how these regulations can work for them.

Visual Units (Films or Videocassettes)

1. Recruitment, Selection, and Placement
2. Promotion and Transfer
3. Discipline and Discharge
4. Preventing Sexual Harassment
5. Preventing Age Discrimination

Shades of Gray

Distributor: Xerox Corporation
P.O. Box 2000, Audio-Visual Department, Leesburg, VA 22075
Telephone: 703-777-8000

Developed for and by Xerox people. This awareness program is now available to other organizations for purchase. The program's purpose is to acquaint managers and employees with the critical elements of this complex issue, and the three reasons (productivity, personal and corporate liability, and internal costs) why managers and employees need to view sexual harassment seriously.

Sexual Harassment Program—A Threat to Your Profits

Phillips Office, Inc., Dayton OH

Directed toward management. EEOC guidelines are explained, as well as steps that employers can take to stop harassment and protect themselves from lawsuits.

Sexual Harassment—That's Not in My Job Description

Phillips Office, Inc., Dayton, OH

Directed toward employees. Addresses harassing behavior toward men and women, including nonemployees, and also addresses the work environment itself. Offers suggestions on confronting and dealing with situations.

A wide range of films, including the two produced by Phillips Office, above, may be ordered from Thompson-Mitchell and Associates, Atlanta, GA, telephone 800-554-1389, or 404-233-5435.

Sexual Harassment Awareness Program

Xerox Learning Systems, 1600 Summer Street, P.O. Box 10211, Stamford, CN 06904
Telephone: 203-965-8400

This program consists of a two-hour, small-group workshop, an award-winning film depicting both male and female points of view, and complete administrator and participant materials for easy facilitation. Objectives are to create an awareness of what constitutes sexual harassment, its consequences, and individual-managerial roles and responsibilities.

Tell Someone: A Program for Combatting Sexual Harassment

Affirmative Action Office, University of Michigan
5080 Fleming Administration Building, Ann Arbor, MI 48109
Telephone: 313-763-5082

This training program includes videotape segments for faculty and students with a trainer's manual, pamphlets, and posters.

You Are The Game

Office of Women's Affairs, Indiana University
Memorial Hall East 123, Bloomington, IN 47405

An educational package for use with faculty, staff, and students, this program includes a videotaped dramatization of two sexual harassment incidents, a discussion guide, and results of a nationwide survey of institutions and their perceptions and guidelines for sexual harassment cases (for rent or purchase).

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Association of American Colleges
1818 R Street, NW
Washington, DC 20009
(202) 387-1300

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New Hampshire Commission on the Status of Women
State House Annex, Rm. 16
Concord, NH 03301
(603) 271-2660
or
New Hampshire Commission for Human Rights
61 South Spring Street
Concord, NH 03301
(603) 271-2767

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Dr. Nan Stein
Department of Education
75 Acton Street
Arlington, MA 02174
(617) 641-4870

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